

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

ORIGINAL
WITH PROOF
OF SERVICE

74-1547

To be argued by

HENRY L. BAYLES

United States Court of Appeals

FOR THE SECOND CIRCUIT

ANNELOU TEIXEIRA, individually and on behalf of
all other persons similarly situated,

Plaintiff-Appellant,

—against—

MORAL RE-ARMAMENT INC. and
UP WITH PEOPLE, INCORPORATED,

Defendants-Appellees.

BRIEF OF APPELLEE—UP WITH PEOPLE, INC.

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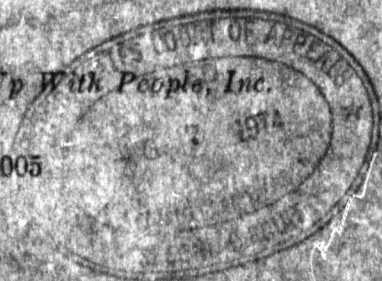


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BRIEF OF APPELLEE—UP WITH PEOPLE, INC.

Statement

This is an appeal by plaintiff from an order of the District Court (Bauman, J.) dated February 25, 1974 (106a)* which (a) denied her motion to have the action maintainable as a class action and (b) granted the motion of defendant, Up With People Inc., (UWP) for summary judgment dismissing the complaint against it. Further since there is a full record upon this appeal, it is respectfully requested that this Court dismiss the action against all parties so that this completely groundless litigation may be finally terminated.

* Unless otherwise indicated, figures in parentheses refer to the page in the Joint Appendix.

The Parties Involved

Plaintiff is a national of Netherlands and is represented in this action by Thomas F. Tivnan, Esq. of the firm of Parker, Duryee, Zunino, Malone & Carter, who signed the complaint.

Defendant, Moral Re-Armament Inc., (MRA) is a non-profit membership corporation with its offices in New York City. It was organized under New York Law and its certificate of incorporation filed on March 7th, 1941. (Teixeira, Ex. B, Birdsall, Ex. A). It was granted tax exempt status as a religious, charitable and educational organization by the Federal Government. (Birdsall, 26a) Originally its name was "The Oxford Group—Moral Re-Armament, MRA, Inc." In 1964 its name was shortened to its present name of Moral Re-Armament Inc. (Teixeira, Ex. B, Birdsall, Ex. B) MRA is represented by Robert L. Tuttle, Esq.

Defendant, Up With People Inc., is a nonprofit membership corporation organized under California Law. Its certificate of incorporation was filed on July 23, 1968. (Birdsall, Ex. L. Teixeira, Ex. C) It was granted tax exempt status as an educational and charitable organization by the Federal Government. (Birdsall, Exs. O, P) Its main office is in Tucson, Arizona. UWP is represented in this action by Henry L. Bayless.

Defendant, Kidder Peabody & Co. is a New York corporation. It is simply a formal party in this action and is represented by the firm of Walsh & Frisch, Esqs.

Nature of This Action

In her complaint (5a-13a) plaintiff alleges that in 1965 she contributed sums aggregating around \$50,000 to the Life Income Fund of MRA and that it was represented to her that they would be used by MRA for its corporate purposes. (¶ 15) She alleges that her contributions were made under the terms of written agreements dated June 21, 1965 and August 4, 1965 (Complaint, Exs. A, B) under which the funds so contributed were to be invested and held by defendant Kidder, Peabody & Co., as custodian.*

Under these agreements, the District Court found, (107a), that plaintiff irrevocably made her contribution to MRA in 1965 and title to the sums passed to MRA at the time and plaintiff's only retained right was to receive income during her lifetime.

The agreements were signed by plaintiff abroad only after she had consulted her advisors in Amsterdam and Mr. Birdsall, who was then Treasurer of MRA, signed the agreements on behalf of MRA. (Birdsall, 29a)

Mr. Birdsall stated that the only conditions agreed upon were in the agreements themselves. (29a) Plaintiff also states that "The terms and conditions of the two agreements with respect to the foregoing are clear" and refers to the agreement themselves. (74a)

Plaintiff alleges that beginning in the year 1968 MRA contributed funds to UWP and that such contributions were not in accord with any of the authorized purposes of MRA. (Complaint ¶¶ 21, 23) Plaintiff alleges that she

* Appellant has not included these exhibits or any exhibits in the Joint Appendix. For the convenience of the Court we are annexing to this Brief a copy of one of the agreements (Exhibit A), the other being the same except for date and amount.

fears after her death MRA may contribute to UWP the funds she had contributed to MRA and seeks to enjoin (a) MRA from making such a contribution in the future if it should desire to do so and (b) UWP from accepting such a contribution. Plaintiff also claims that there are other persons who made similar contributions to MRA and brings this suit as a class action.

The summons and complaint are dated January 2, 1973 and were served on UWP in Tucson, Arizona on January 9, 1973.

Functions of MRA and UWP

The Certificates of Incorporation of MRA and UWP may be found annexed to plaintiff's opposing affidavit (Exs. B, C) and the moving affidavit of Donald P. Birdsall. (Exs. A, L)

For many years until 1968 Mr. Birdsall was an officer and director of MRA. He was personally acquainted with Dr. Buchman. In 1968 he left MRA and participated in the organization of UWP. He is its Executive Vice-President. (25a, 21a)

In her brief (17) appellant asserts that MRA was incorporated "for one specific purpose" and quotes only the following purpose:

"2A. The advancement of the Christian religion, and in particular by the means and in accordance with the principles of THE OXFORD GROUP and FIRST CENTURY CHRISTIAN FELLOWSHIP, founded by Frank Nathan Daniel Buchman, and its program of MORAL RE-ARMAMENT, whose aim is personal, social, racial, national and supernational salvation."

But in making this statement appellant does not mention additional broad powers contained in MRA's Certificate of Incorporation. (Teixeira, Ex. B; Birdsall, Ex. A).

As separate and independent powers, wholly apart from the powers conferred under ¶ 2A, MRA's charter authorizes it:

"2B. To disseminate Christian teachings among the people of the United States and other countries by means of the preparation, publication and circulation of magazines, pamphlets, books, songs, music and other writings, or by means of radio or television broadcasts, or the use of sound or motion picture films."

Christian "teachings" as used in this paragraph do not refer to any narrow religious dogma but to the universal principles of brotherhood, justice, tolerance and morality, which exist in all of the major religions. See the affidavit of George A. Vondermuhll, Jr. (43a et seq.). Mr. Vondermuhll has been associated with MRA since its beginning in 1941 and with Dr. Frank Buchman, now deceased, since 1935; also see the affidavit of Mr. Birdsall (25a-27a).

Then ¶ 2C of its charter goes on to authorize MRA:—

"To engage in one or more activities of a religious, charitable *or* educational nature which may be necessary *or* proper to carry out said purposes and objects."
(italics added)

The Charter then under ¶ 2D(1) empowers MRA to receive donations, contributions and bequests and in ¶ 2D(2) states that it has authority:—

"To establish and support, or aid in the establishment and support, of any religious, charitable *or* educational associations or institutions, and to con-

tribute money for religious, charitable *or* educational purposes *in any way connected with the purposes of the corporation or calculated to further its purpose.*" (italics added)

Finally, the Charter (§ 2D(3)) authorizes MRA:—

"To do all such other things as are *incidental or conducive* to the attainment of the above objects *or* any of them." (italics added)

In addition to these Charter provisions, the Not-For-Profit Corporation Law of New York provides the following with respect to the right of MRA to make contributions:

"§ 202(a) Each corporation, subject to any limitations provide in this chapter or any other statute of this state or its certificate of incorporation, shall have power in furtherance of its corporate purposes:

• • •

"(7) To make capital contributions or subventions to other not-for-profit corporations."

• • •

"(14) To make donations, irrespective of corporate benefit, for the public welfare or for community fund, hospital, charitable, educational, scientific, civic or similar purposes, and in time of war or other national emergency in aid thereof."

As indicated in the affidavits of Messrs. Birdsall of UWP and Vondermuhll of MRA, ever since the organization of MRA it has carried on a wide variety of functions and this is not denied in the opposing affidavit of plaintiff. The Directors determined some years ago in line with Dr. Buchman's philosophy, that MRA would not follow a narrow religious line but would engage in broad activities

of a non-dogmatic religious, charitable and educational nature whose underlying purpose would be to foster brotherhood, tolerance, morality and mutual understanding among all people.

As part of its activities, MRA in addition to UWP has founded other organizations such as Sing-Out High School, Mackinac College, Pace Magazine, Bear Creek Ranch (see its Annual Reports) and has also, as set forth in the affidavit of Mr. Vondermuhll (99a-101a), contributed large sums to the support of various institutions in the United States and throughout the world.

It is also not denied that MRA has for some years as part of its activities carried on various public performances. (Vondermuhll, 52a et seq). In accordance with its Charter ¶ 2B, from the very inception of its organization MRA was a firm believer in the use of songs, music, performances, radio and television, etc. in its efforts to spread the doctrine of universal brotherhood, morality and toleration among all people.

In the year 1965 MRA using the theme of a song "Up With People", the copyright of which was owned by MRA, began to strongly develop Up With People and Sing Out programs with young people. The scope of MRA's activities in this respect can best be ascertained by a reading of the Annual Reports of MRA for the years 1965-1966-1967 and 1968. Copies of these Annual Reports were delivered to the District Court and plaintiff's attorneys (30a) and will be submitted to this Court.

As the Annual Report of 1968 indicates, MRA's program dealing with Up With People and Sing Out became such a widespread success by that time that the directors of MRA decided (Birdsall, 32a, Ex. K) that a separate and independent organization should be organized whose pri-

mary function would be to carry out specifically the Up With People and Sing Out functions.

Accordingly, on July 23, 1968, Up With People Inc. was organized under the laws of California as a separate non-profit membership corporation with wide charitable and educational powers. Its Charter provides in part (Birdsall Ex. L, Teixeira Ex. C):

"The purposes for which this corporation is formed are exclusively charitable and educational as herein set forth, the specific and primary purpose for which it is formed being set forth in subparagraph (a) of this Article II:

(a) The specific activity in which the corporation is primarily to engage is the organization, coordination and education of individuals and groups with a view toward developing leadership, responsibility and understanding among individuals, races, classes, cultures and nations.

(b) To solicit, collect, receive, acquire, hold and invest money and property, both real and personal, received by gift, contribution, bequest, devise or otherwise * * *."

After its organization, UWP continued and amplified the activities of Up With People and Sing Out. Wherever the young people performed they were enthusiastically received and warmly praised by educators, congressmen, senators, etc. (Birdsall, Ex. Q). The songs stressed by UWP as they had been before by MRA, were "Up With People" and "What Color is God's Skin?" (58a).

For a complete statement of the charitable and educational activities of UWP, the Court is respectfully referred to the Annual Reports of UWP for the years 1969-1970-

1971-1972. These reports were handed to the District Court and plaintiff's attorneys and copies will be submitted to this Court. See also Birdsall, 33a-35a and Exs. M, N for a discussion of additional activities.

At the outset MRA supported UWP with substantial contributions (Birdsall, 33a). As the good work of UWP became better known, contributions came in from numerous sources. In addition to contributions, UWP received income derived from tuition paid by young people, sums received from performances which were not rendered gratuitously, sale of records, etc. (Birdsall, 34a). Every cent received by UWP was and has been strictly accounted for and no sum whatsoever has been used for the personal benefit of anyone (Birdsall 90a). See also paragraph VII of its Certificate of Incorporation (Birdsall, Ex. L, Teixeira Ex. C). The affairs of UWP have been audited by Andersen and Company. (See each of its Annual Reports).

When it was organized, UWP submitted an application to the Federal Government for tax exemption (Birdsall, Ex. O) and the government promptly granted its application (Birdsall, Ex. P).

UWP is particularly desirous of obtaining contributions from all sources to its Scholarship Fund to aid needy and deserving students (34a). UWP would, of course, like to have MRA again continue to assist and make contributions to UWP. However, UWP has no assurance that MRA will do so and UWP is not relying or counting upon MRA's future contributions for the carrying out of the activities of UWP (34a). Although some of its present administration came from MRA, UWP is a separate independent organization with its own officers, administration and governing board.

UWP has and is vigorously opposing what it believes is this wholly groundless lawsuit for an injunction insti-

tuted by plaintiff because UWP does not wish to be in a position of having to refuse to accept any future contributions from MRA and also for the reason that UWP does not wish to have its name stigmatized by any injunction as if it had been guilty of some improper conduct.

Litigation between MRA and a Dissident Group

The file in the Supreme Court, New York County in the case of *Matter of Moral Rearmament Inc.*, petitioner against *The Oxford Group-Moral Rearmament and others*, respondents (Index #4472-1971) was requisitioned upon the motions in the District Court by both MRA and UWP, and will be presented to this Court. It is submitted that this litigation is quite relevant to the good faith of the instant suit. (Birdsall, 38a-41a; Vondermulil, 94a-96a)

This action was instituted by MRA against a dissident group which broke away from MRA prior to November 16, 1970 and incorporated itself in New York under the misleading name of "The Oxford Group—MRA", a name very similar to that formerly used by MRA. The dissident group claimed to be exclusively religious and did not favor the broad and liberal purpose followed by MRA and began to compete with MRA for contributions.

When MRA ascertained that the dissident group had been organized under a similar name and that it was seeking to divert contributions which might have otherwise gone to it, MRA instituted an action in Supreme Court, New York County. In this action MRA sought to obtain an injunction against the dissident group's use of the misleading name.

In that action MRA moved by summary application for an injunction and the dissident group cross moved to dis-

miss and also moved for an application to examine MRA in order to obtain the names of its contributors. (See Tivnan, Ex. 1, bottom, second page.)

After a full hearing the Court (Asch, J.) in an opinion stated that "On the facts now before the Court it is clear that respondent's use of its name is confusing and misleading to the public * * *". The Court signed an order and judgment dated August 6, 1971 (Tivnan, Ex. 1) which granted a broad injunction against the use of the names "The Oxford Group" or "MRA" or "Moral Re-Armament" either as part of the name of the dissident group or in connection with any of its activities. Thereafter, the dissident group changed its name to "Caux Challenge—U.S.A."

During the course of the injunction and contempt proceedings, the dissident group sought unsuccessfully to examine MRA before trial and to require it to produce various matters including the following: (Appellate Division Record on Appeal p. 146)

"A list of all gifts, donations, contributions, devises and bequests made to Plaintiff [MRA] from January 1, 1965 to the present time by any person, estate, firm, partnership or corporation."

In the present action the same attorneys now representing plaintiff by a Notice returnable April 9, 1973 (Bayles, Ex. C) requested that the Court approve the instant suit as a proper class action and in that connection to determine "the membership of the class", i.e., the names and addresses of contributors to MRA under the Life Income Agreements.

In a circular letter dated December, 1971 (Bayles, Ex. A), the Executive Director of the dissident group stated that unlike MRA, the charter of the dissident group provided that its purposes "shall be exclusively religious"

(p. 2) He pointed out that MRA had much broader purposes, stating (p. 1):

"At the same time it (MRA) has enlarged its educational aspect by contributing substantially to the support of an organization known originally as Sing Out and since being incorporated in 1968 as Up With People."

The letter goes on to state (p. 2) that *after taking the advice of its counsel*, the dissident group reached the conclusion:—

"Unfortunately, there was nothing we could do legally to prevent Moral Re-Armament Inc. from supporting Up With People because of the breadth of Moral Re-Armament Inc.'s charter as revised in 1957."

The letter further stated (p. 3) that the dissident group would "faithfully obey the Court's order (injunction)" and would not use "Oxford Group" or "Moral Re-Armament" or "MRA".

However, the dissident group the following month changed its mind and sent another circular letter dated January 1972. (Bayles, Ex. B) It stated that although it had changed its name, it would still continue to use the words "Oxford Group" and "Moral Re-Armament" in its activities and it was doing so under "the advice of counsel". (p. 1)

Upon ascertaining that the dissident group was continuing to use the names of Oxford Group and Moral Rearmament in its activities, MRA applied for an order to hold the dissident group in contempt for violating the injunction. The application was strenuously opposed.

By order dated April 28, 1972, Mr. Justice Streit found that the dissident group was guilty of "misconduct" and

had "wilfully" violated the injunction and that the action of the dissident group "was calculated to and did defeat, impair, impede and prejudice the rights and remedies of the petitioner (MRA) herein". The order fined the dissident group and provided that it may "purge its contempt upon payment of said fine and by continually complying with the provisions of the aforesaid judgment".

An appeal was taken by the dissident group from the order holding it in contempt. The Appellate Division unanimously affirmed on January 25, 1973. Applications by the dissident group for rehearing or for leave to appeal to the Court of Appeals were denied by the Appellate Division as well as by the Court of Appeals.*

It is significant to note that the same firm of attorneys and its counsel Mr. Tivnan who represented the dissident group throughout all of the foregoing proceedings are also representing plaintiff in the present action. It is not denied that the same counsel who now state that in their opinion MRA has no power to support UWP, stated previously that in their opinion MRA did have such power. (Bayles, Ex. A, 39a; Vondermuhll, 95a, 96a)

It is no coincidence that the present class action was only instituted in January 1973 after the dissident group had been enjoined, and after it had been found guilty of contempt and after it had been prevented from examining MRA in an attempt to ascertain the names of contributors to MRA.

Appellant's brief states (p. 15) that defendants can only show the "bad faith" of plaintiff by proving that she is

* MRA advises that thereafter when the dissident group continued to violate the injunction, MRA made another application to punish it for contempt; it was again granted and the dissident group again fined.

acting in concert with Caux Challenge Inc. to violate the injunction. That however is not our contention. The issue here is not any violation of an injunction but the use of this "class action" and injunction proceeding simply as a subterfuge and an improper means to obtain a list of MRA's contributors and for propaganda purposes by the dissident group (see also *infra*, pp. 20-22).

With respect to this injunction and contempt litigation, plaintiff states that she does not have any personal knowledge but that the matter will be discussed in the affidavit of her counsel Mr. Tivnan. (69a, 79a)

The affidavit of Mr. Tivnan however simply states (87a): "It should be readily apparent that Plaintiff in this action is not a member of Caux (the dissident group)." But there is nothing in the opposing affidavits that makes this at all "apparent" and plaintiff herself in her affidavit does not so state. In that connection see *infra* p. 22.

Then, Mr. Tivnan, in an attempt to prove that his present demand for a class action and list of contributors to MRA is being made in good faith, states (87a):

"It is further apparent that she (plaintiff) *personally* could not make use of any list of contributors to MRA or to its Life Income Fund." (italics added)

Mr. Tivnan must have made this contention with tongue-in-cheek for it is perfectly obvious that he as counsel for Caux Challenge Inc., the dissident group, and his client if they obtained such a list, could make excellent use of it for their own improper advantage and to the serious prejudice of MRA.

**Plaintiff's Approval of Up with People and
Sing-Out Activities**

The moving affidavit of Mr. Birdsall (30a et seq.) states that copies of MRA's Annual Reports and other reports were regularly sent by MRA to its contributors and other interested persons, and that plaintiff received these reports during the period 1965-1968. This has not been denied by plaintiff.

The moving affidavit of Mr. Birdsall further annexes copies of letters sent by plaintiff herself to him as well as other representatives of MRA in which she enthusiastically *supported* and approved the Sing-Out and Up With People programs particularly since they involved the youth. (Birdsall, Exhibits F, G, H, I, J)

So in her letter to MRA's representative dated August 20, 1965 (Exhibit F), plaintiff after acknowledging receipt of a copy of the Life Income Agreement, noted:

"I was very glad to read the fascinating news coming in from 'Sing-Out '65'. It is most heartening."

Then in a letter of January 19th, 1966 addressed to Mr. Birdsall (Exhibit G) plaintiff wrote (first page):

"The news of 'Sing-Out '66' and the second cast for the Northwest is most inspiring."

In another letter to him dated June 6, 1966 (Exhibit H) she stated that the Annual Report had not as yet been received by her. Later, in her letter to him dated July 25, 1966 (Exhibit I), she acknowledged receipt and noted:

"I was much interested in all the news of Sing-Out '66 especially in Spain. From various articles in the press here I gather that that country is in a period of transition where the young generation is going to

have a great part in shaping the future of the country. I feel the visit was providential at this time."

Then in her letter dated August 31, 1968 to William F. Wilkes, MRA's Director of Life Income Fund, (Exhibit J) plaintiff acknowledges receipt of his letter of July 15th "and the interesting Annual [1967] Report."

MRA's Annual Report for 1965, which plaintiff found "fascinating" and "most heartening", goes into detail with its "Sing Out" Program. (pp. 2-7, 15)

MRA's Annual Report for 1966 was specifically entitled "The 'Up With People' Year". This report contains a message from J. Blanton Belk who was then MRA's Board Chairman and Executive Director and is now, and has been since 1968, President of UWP. His message to contributors (pp. 2, 3) states that contributions to MRA were used for many purposes including the following: the addition of two new full time casts of 150 members each, to the one original cast of *Up With People*—the establishment of high schools on the road to provide education for high school students traveling with the three casts—performances by these *Up With People* casts for 320 colleges and high schools and 89 military bases—visits of casts totalling more than six months in eight countries—the development of 128 regional Sing-Outs across America involving some 15,000 high school and college students and their families in positive community programs.

It was this 1966 Annual Report containing news of "Sing-Out 66" which plaintiff found in her letters, "most inspiring" and in which she was "much interested", particularly in Spain where "the young generation is going to have a great part in shaping the future of the country," and she states she feels the visit was "providential" at this time.

MRA's Annual Report for 1967 which is specifically entitled "Up With People", plaintiff found "interesting". The highlights of that Report (p. 5) were, among other things, the following: 1125 young men and women spent six months or more with the *Up With People* program which included training in the development of leadership and its specific skills—5000 youth participated in the summer's three-month World Sing-Out Festival—three national casts gave 399 full performances including 64 for universities and colleges, 20 for the military and 16 for conventions and expositions including Expo 67—by the end of 1967 regional Sing-Outs in the U.S. numbered 214—*Up With People* accepted invitations to Canada and Panama, and a delegations of young Americans traveled with *Let's Go '67*, the Japanese Sing-Out, in the Philippines, Indonesia and Singapore—*Up With People* performed on the streets of Lower and West side Manhattan, Harlem, Chicago, Washington D.C. and other cities. The same report stated (p. 15) that Sing-out High School, which provides education for students traveling with the national casts, graduated its first senior class of 72 on July 1—that among them were two National Merit Scholarship finalists—by December, 1967 there were 155 students from 33 states and 7 countries enrolled in the school and that this will be doubled in 1968—the curriculum includes 182 courses provided and graded by the University of Nebraska, high school division.—An additional innovation was the arrangement whereby college students were able to continue their studies on the road while working with *Up With People*.

Then the 1968 Annual Report which plaintiff did not deny receiving, contains a report from its Board Chairman to contributors, reading in part as follows:

"Moral Re-Armament since its beginning has aspired to carry mankind forward to a new age. In pursuing

this goal, MRA has moved as an evolving expansive force relating itself to the live issues of the day, using fresh forms for its truth, developing new channels of action and communication.

In the past year Moral Re-Armament has continued to help carry forward the program of Up With People. The remarkable expansion of Up With People with its strong educational emphasis, made it seem advisable to the directors of Moral Re-Armament, Inc. to permit and encourage the formation of a new, separate, non-profit corporation in order to best develop the program's unique educational potential, and facilitate its further rapid expansion. The transfer of the Up With People program to Up With People Incorporated took place on September 1, 1968. This transfer will in no way replace, supplant or be a substitute for Moral Re-Armament or any of its other activities. * * *

The 1968 Annual Report of MRA (next to last page) also states as Note 3 to its Financial Statement, the following:—

"Gift of 'Up With People' and 'Sing Out'

On September 1, 1968 certain plant and equipment used by 'Up With People' and 'Sing Out' (divisions of the Company), were transferred to a newly formed corporation. The assets were transferred at net book value and resulted in no gain or loss. The income and expense of the operations of 'Up With People' and 'Sing Out' through August 31, 1968 are included in the financial statement."

In her opposing affidavit plaintiff does not deny her receipt of MRA's Annual Reports and the accuracy of her letters and states (68a):—

"With respect to my prior knowledge of the formation of MRA of enterprises known by and as 'Sing-Outs' and the like, the documents appended to Mr. Birdsall's affidavit are absolutely correct".

The foregoing indicates that insofar as plaintiff was concerned, the Up With People and Sing Out programs and its emphasis upon the youth of this and other countries carried on by MRA were in complete furtherance of its broad purposes. She raised no obligation when MRA carried on these programs itself or when in 1968 it transferred these functions to UWP and supported the latter organization. Plaintiff's present claim that she only ascertained in 1972* (68a, 69a) that MRA had substantially supported UWP is not credible.

It will be noted that in the past with plaintiff's knowledge and approval (since the matters are reflected in the Annual Reports), MRA has supported many other worthwhile charitable and educational organizations. So for example in 1965, MRA transferred large properties for the establishment of a liberal arts college known as Mackinac College (see 1965 Annual Report, p. 13). Also at the same time that it established UWP in 1968, MRA also transferred Pace Magazine which MRA itself had been maintaining to a new corporation known as Pace Programs Inc. (1968 Annual Report, p. 2) See also Mr. Vondermuhl's affidavit (99a-101a) setting forth the substantial contributions made by MRA over the years to various organizations.

The activities of UWP with respect to its Up With People and Sing-Out educational and charitable functions

* MRA severely questions (95a, 96a) the propriety of the action of the attorneys for Caux Challenge Inc. in obtaining from the Internal Revenue Service a copy of MRA's 1970 Tax Return which listed certain contributions to MRA. (Texeira, Ex. G, last schedule)

are set forth in its Annual Reports for 1969, 1970, 1971 and 1972 which were submitted to the District Court and to which this Court's attention is respectfully invited. See also UWP's 1973 publication "Up With People" (Birdsall, Ex. N) and the address by the President of UWP outlining its origin and purposes. (Birdsall, Ex. M)

A comparison of these programs carried on by UWP discloses beyond any question that they have essentially the same underlying purposes and format as the programs which MRA carried on itself prior to 1968.

Plaintiff states that she only approved these Sing-Out and Up With People activities by MRA because she believed they were in line with certain principles of Dr. Buckman. (68a) She now claims—some eight years after she made her contributions and some five years after the organization of UWP—that she feels that somehow the activities carried on by UWP (which we have shown are essentially the same) do not carry out these principles. (68a) But she fails to submit any credible evidence to justify her change of belief. She does not at all show that UWP's activities do not support the same broad principles of brotherhood, tolerance, morality and justice which MRA's programs of Up With People and Sing out previously supported. (47a-57a; and see the Annual Reports of MRA and UWP)

It is obvious that this change of feeling has been conveniently taken by plaintiff in order to support the dissident group which broke away from MRA. Apparently it was only at the instigation of the dissident group that she agreed in 1973 to act as plaintiff in the present action.

Proceedings Before Staff Counsel of This Court

The lack of good faith of the present action became evident during the pre-appeal conferences before Nathan

Fensterstock, Esq., Staff Counsel of this Court. These conferences were participated in by Mr. Tivnan, plaintiff's counsel, Mr. Tuttle, MRA's counsel and Mr. Bayles, UWP's counsel (See Record of the conferences and also defendants' papers in opposition to appellant's motion in this court which motion was withdrawn).

During these conferences the Staff Counsel patiently and conscientiously attempted to resolve not only the appeal but the district court action as well. After carefully ascertaining from respective counsel the facts and their positions, and the nature of the injunctive relief requested by plaintiff, he inquired during one of the conferences whether MRA would be willing to modify its written agreements with plaintiff so as to provide that upon her death no part of her contribution would be given to UWP and that such modification would not constitute an admission that UWP was not a proper beneficiary of MRA's contribution.

Mr. Tuttle counsel for MRA after consultation agreed to this. But Mr. Tivnan was not satisfied. He insisted upon having the modified agreement specify what particular use MRA would make of plaintiff's contribution upon her death. The Staff Counsel then suggested that ten well-known charitable organizations in the United States such as Red Cross, Cancer Care, etc. should be selected jointly by the plaintiff and MRA.

MRA was willing to agree to this. Mr. Tivnan however rejected this proposal. Instead he proposed that a Dutch organization be made the beneficiary. MRA finally agreed that it would be willing to enter into an agreement modifying the agreements with plaintiff to provide that if, upon plaintiff's death, it did not use her contribution for its own maintenance (which Mr. Tivnan conceded was, of course, proper) it would make a gift to the particular Dutch organization specified by Mr. Tivnan. Then Mr. Tivnan reported that even this was not satisfactory.

Thus MRA—in the interest of disposing of the litigation and appeal at the suggestion of Staff Attorney, was willing to substantially modify the written agreement which would have granted plaintiff (apart from the demand for class action) even greater relief than she would have obtained if she had completely prevailed in the injunction suit. But Mr. Tivnan insisted on continuing with this appeal for the class action and, if defeated, with the injunction action below.

However, an even more startling matter developed during these conferences. When questioned at the conferences, Mr. Tivnan admitted (a) that plaintiff actually was a supporter of the dissident group (Caux Challenge Inc.) which he had advised was continuing to represent and and (b) that during the conferences before Staff Counsel, he had been in touch with a Mr. Campbell, an active leader of Caux Challenge, the dissident group, who had advised him to reject the various proposals.

It thus is evident that the institution of this injunction suit and demand for class action was not for the alleged purpose of preventing a contribution to UWP but was in fact simply a subterfuge so that (1) the dissident group by applying for class action in plaintiff's name could try to obtain the names and addresses of contributors to MRA which they could use for its own purposes after having failed to obtain such a list in the state court proceedings and (2) even if not successful in this respect in this court, it hoped that by keeping the "injunction" action pending against MRA and UWP, the dissident group could use it for propaganda purposes and to try to counteract the harmful effect resulting from the state court injunction and contempt orders which MRA had obtained against it.

POINT I

The District Court properly dismissed the complaint against UWP.

An injunction is a drastic remedy which will not be granted except upon clear and convincing proof to prevent irreparable injury and not some hypothetical future contingency. Here plaintiff who entered into two Life Income Agreements with MRA does not seek to cancel them, even though her complaint uses such expressions as "false and fraudulent" (§ 26) and "violations of the common law of fiduciary duty, deceit, conversion and fraud in the inducement". (§ 10) She is content to receive her share of the income until her death under the agreements, as she has received it in the past. (72a)

In this connection the District Court noted (114a, 115a):

"The first concerns the propriety of injunctive relief. Plaintiff's bare assertion that she does not have an adequate remedy at law is not altogether convincing. Indeed, her apparent lack of interest in the return of her money may be regarded as undermining her claims of irreparable harm and inadequate remedies at law. The burden of proof of such inadequacy rests on the plaintiff; the absence of such a remedy must be clearly disclosed by the evidence. (citing cases)"

Plaintiff asserts that if upon her death, MRA should determine to use the portion of the Life Income Fund representing her original contributions, by making a distribution thereof to UWP, this would not be within the corporate purposes of MRA and in violation of a representation to her. She requests an injunction not only against MRA restraining it from making such payment in the future but also restraining UWP from receiving it.

We believe that the Record discloses that plaintiff has no meritorious cause of action for an injunction either against MRA or UWP. However, even if plaintiff should be entitled to an injunction against MRA, she has failed to show any justification for her application to enjoin UWP at some indefinite time in the future from accepting a contribution from MRA. She has failed to show that an injunction against MRA, if granted, would not give her all the necessary relief. It is clear that an injunction will not be granted in broader terms than that needed to grant adequate relief. (*Hodgson v. Corning Glass Works*, 474 F. 2d. 226, 236)

It may be noted that appellant's brief does not at all discuss the grounds upon which the District Court dismissed the complaint against UWP. The opinion of the District Court is clear (113a, 114a):—

“Nothing before the court supports in any way a cause of action against UWP. Indeed under any of the possible theories upon which plaintiff's case may rest [i.e. breach of fiduciary duty, deceit, or fraud in the inducement] UWP would not be culpable. Surely it owes no fiduciary duty to plaintiff. She is not a member of, nor a contributor to the organization. None of plaintiff's money is in UWP's possession. Furthermore, since its corporate existence only dates back to 1962, UWP was neither a formal party to the Life Income Agreement nor a participant in any alleged fraudulent inducement. Finally, there is no allegation that UWP acted, or threatens to act in the future, as a co-conspirator, aider or abettor or in any other improper manner. Its Articles of Incorporation grant it the power to accept charitable contributions. Plaintiff has accused it of doing no more.”

"Upon that basis, then, UWP's motion for a summary is granted. It should be noted that plaintiff is in no way harmed by this decision. Should it obtain its requested injunctive relief against MRA, further relief against UWP would be superfluous. The injunction sought would bind all MRA's officers, directors, employees, agents, attorneys and anyone acting on its behalf. That, it seems to me, would suffice."

Apart from any other grounds, it is respectfully submitted that the decision of the District Court dismissing the complaint against UWP was proper and should be affirmed.

POINT II

Appellant's appeal from the order denying class action should be dismissed; or in the alternative the order should be affirmed.

The Record shows that plaintiff is an intelligent person, now about 63 years of age and of substantial means. (29a) She first expressed her desire to make a contribution to MRA in October 1964 and before doing so in 1965, she went thoroughly into the tax consequences and consulted with her advisors abroad. (29a) When she signed the agreements in Amsterdam they were witnessed by her financial advisors Schill & Capadose. (29a Complaint Exs. A, B)

Her contribution is so substantial that if she has a meritorious claim it would be in her interest to proceed on her own account in an action.

She is being represented by a firm of attorneys whose representation obviously is not contingent upon her claim for class action being sustained. On the contrary, after her application for class action was denied by the District

Court, her attorneys served a notice for the examination before trial of MRA which has been adjourned.

The denial of the class action clearly does not and would not *ipso facto* result in a termination of this law suit or its "death knell". It has been held under such circumstances that an order denying class action is not appealable. (*Shayne v. Madison Square Garden Corp.*, 491 F 2d 397; *Caceres v. International Air Transport Ass.*, 422 F 2d 141; *Hartmann v. Scott*, 488 F 2d 1215, 1223)

In addition, there are other grounds to sustain the denial of the class action. Plaintiff asserts that a representation was made to her before she signed the Life Income Agreements which she claimed she relied upon and that these representations were false. Although she claims that the same representations were made to other contributors (¶¶ 15, 26), she has submitted no proof whatsoever of this. Even her own representations are vague and not particularized. Since no proof whatsoever has been shown that any alleged misrepresentation was made to anyone else, it is submitted that plaintiff does not constitute a proper representative of a class.

Furthermore since plaintiff also specifically approved the Up With People activities and failed to take action for some eight years, her own claim is barred irrespective of what rights other contributors might have and she is therefore not a proper representative of the class.

If plaintiff cannot establish that she herself has a valid and meritorious equitable cause of action, her class action claim will be denied and her claim is not improved by its inclusion in a demand for class action. (*Mintz v. Mathers Fund, Inc.*, 463 F 2d 495; Moore's Fed. Pract. Vol. 3B § 23.04)

We have also shown that plaintiff's demand for class action has not been and is not being made in good faith

(*supra*, pp. 10-14, 20-22) and accordingly, the courts should not permit a class action to be used for ulterior purposes. (*Baim & Blank, Inc. v. Warren-Connelly Co.*, 19 F.R.D. 108, 111; *Free World Foreign Cars, Inc. v. Alfa Romeo*, 55 F.R.D. 26, 30; *Carlisle v. LTV Electrosystems, Inc.*, 51 F.R.D. 237, 240)

It is therefore respectfully submitted that plaintiff's appeal from the order denying her application for class action should either be dismissed or affirmed.

POINT III

This Court upon the full record should exercise its discretion and dismiss the complaint against all parties.

This Court has discretion upon an appeal where the full record is before it to dismiss a groundless complaint in the interests of justice and efficiency in judicial administration. (*Hurwitz v. Directors Guild of America Inc.*, 364 F 2d 67, 70; cert. denied 385 U.S. 971; *Aerojet-General Corp. v. American Arbitration Association*, 478 F 2d 248 at 252, 253).

We respectfully submit that upon this appeal this Court should exercise such right and dismiss the action against all defendants terminating this litigation.

Although plaintiff has claimed misrepresentation and fraud inducing her to enter into the contracts signed by her abroad, she has not submitted any names or any proof sustaining such claim.

Furthermore, plaintiff has throughout her affidavit limited her claim not to any alleged misrepresentation, but simply to a demand that "the money be applied to the purposes set forth in the certificate of incorporation of MRA subsequent to my death" (74a) and that the terms of her agreements are "clear". (74a)

She makes no claim that MRA does not have power to make contributions but asserts that any contribution which MRA may see fit to make to UWP after her death out of its Life Income Fund would not be in accordance with its powers and seeks a present injunction to prevent this.

It is respectfully submitted that plaintiff's contention is without merit and that under its broad charter provisions as well as the statute, MRA has clear authority to make such a contribution.

At the outset we urge that without our considering the charter or statutory provisions, plaintiff has no standing to complain. The Record is crystal clear that she specifically approved the Up With People and Sing Out functions when they were carried out by MRA itself and she should not be heard to complain now—some eight years later—if MRA in the future should desire to contribute to UWP to assist it in carrying out the same activities. (*supra* pp. 15-20)

Turning to the Charter (Teixeira, Ex. B; Birdsall, Ex. A) we find that under ¶ 2D(1) MRA has authority:

"To establish and support, or aid in the establishment and support, of any religious, charitable *or* educational associations or institutions, and to contribute money for religious, charitable *or* educational purposes *in any way* connected with the purposes of the corporation *or calculated* to further its purpose." (italics added)

Under ¶ 2D(3) MRA is authorized

"To do all such other things as are *incidental or conducive* to the attainment of the above objects *or* any of them." (italics added)

As the Record indicates, ever since its organization MRA has supported or contributed to a number of worthwhile existing organizations and aided in the establishment of new ones. (Annual Reports; *supra* p. 7)

As the affidavit of Mr. Vondernuhll shows, a contribution by MRA to UWP would aid in the furtherance of the broad principles of Dr. Buchman and would clearly come within the purview of ¶ 2A of MRA's Charter. (43a et seq.)

Then in addition such a contribution would be authorized under the provision of ¶ 2B in connection with the dissemination of Christian teachings (used in the broad sense) by means of songs, music, etc., and would also follow from MRA's authority under ¶ 2C "To engage in one or more activities of a religious, charitable or educational nature which may be necessary or proper to carry out said purposes and objects."

Finally, since the Board of Directors of MRA in good faith believe that a gift to UWP is not only connected with one or more of its purposes, but that it is "calculated to further its purpose" (¶ 2D(1)) or is "incidental or conducive" to the attainment of any of its purposes (¶ 2D(3)), it is respectfully submitted that under its charter, MRA has clear authority, as a matter of law, to make a gift to UWP in the future if it should desire to do so. Plaintiff should not be permitted to substitute her own present opinion for that of the governing board of MRA.

As we have noted (*supra*, pp. 12, 13) it was the opinion of plaintiff's attorneys, acting for Caux Challenge Inc., prior to the institution of this action, that MRA did have clear authority to contribute to UWP "because of the breadth of Moral Re-Armament Inc.'s Charter * * *." They have

not denied this nor given any reason why they are advancing a contrary legal opinion in this action.

However, wholly apart from any specific Charter provisions, MRA has a statutory right to make a future contribution to UWP. The latter is a nonprofit membership corporation with broad charitable and educational functions and has been granted tax-exempt status in connection with its activities. (Birdsall, Exs. L, O, P) Even plaintiff admits that the activities of UWP are "laudable" (72a).

Under § 202(a)(7) of the Not-For-Profit Corporation Law of New York (*supra*, p. 6) MRA has power "To make capital contributions or subventions to other not-for-profit corporations" and it is submitted that a future contribution by MRA to UWP would be authorized by this section. (See also § 202(a)(14) *supra*, p. 6)

We further submit that the Charter and statutory provisions are clear and there is no need for any implication of powers to justify the action of the Directors of MRA if they should determine to make a contribution to UWP in the future.

However, if it should be necessary, this Court is justified to apply the doctrine of implied powers to justify any such action of MRA Directors. As we stated in *Matter of German Jewish Children's Aid, Inc.*, 151 Misc. 834, 839:

"There is no reason why the doctrine of implied powers should not apply to a non-profit corporation as it does to a business corporation. In 6 Fletcher's Cyclo-pedia of Corporations (§ 2544, at pp. 292, 293) it is said

'Like other corporations, a charitable corporation has in addition to its express powers, such implied powers as are necessary to carry out those expressly granted (citing cases)'".

Not only does plaintiff have no meritorious claim because MRA is authorized to make a contribution to UWP, but in addition the Record discloses that plaintiff has no valid equitable claim for injunction for she has not established danger of irreparable injury and that she does not have an adequate remedy at law. Further, whatever equitable claim she may have is clearly barred not only because of her prior approval of Up With People activity but because of her gross laches over a period of many years.

Finally it is submitted that a court should not assist her in this equity action since it has been shown that it was instituted and is being continued in bad faith not to restrain MRA from making a future gift to UWP, but to obtain for the use of the dissident group a list of the contributors to MRA and to keep the "injunction" suit going in any event for propaganda purposes.

Even in the cases of corporations organized under the Religious Corporation Law, the courts have liberally interpreted the authority to act where the governing body in good faith seeks to perform a function which it believes carries out one of the essential purposes of the organization.

The case of *Knight v. Presbytery of W.N.Y.*, 26 App. Div. (2) 19 aff'd 18 N.Y. (2d) 868 is of interest because of the language used by the court even though it involves a religious corporation. There some elders of the Church, a dissident group, sought an injunction to restrain the Church from contributing a sum which had been authorized by its Board to be paid to East Side Community Organization Inc. described by the Court as (p. 20):

" * * * a nonprofit membership corporation organized to promote and encourage in the east side of Buffalo better housing standards and good citizenship and to provide social and recreational facilities and

services for members and families of a community organization".

The Court denying a motion for injunction and dismissing the complaint, stated (pp. 22, 23):

"The basic issue as framed by the complaint is that the proposed use of the funds would be a diversion thereof from the trust purposes for which they were originally donated which were, according to plaintiffs, 'to promote the promulgation or teachings of the doctrines and tenets' of the Presbyterian Church. There is conclusive factual proof, however, that for many years such doctrines and tenets have extended beyond the religious views of the members of this faith and the conversion of others thereto.

There is evidence that the church has been engaged in purposeful social action to help people without regard to religious affiliations to make better lives for themselves. Thus, some one hundred settlement houses or neighborhood projects are maintained where there is no emphasis on the teaching or promulgating of the tenets or doctrine of this church. Similarly, colleges and schools are maintained in countries of the Middle East where it is illegal to teach the Christian gospel or to attempt to convert.

More specifically, the General Assembly shortly before the commencement of this action embraced a statement of policy adopted by the Board of National Missions which, among other things, supported 'action which deals with the fundamental ills of modern life, particularly the uneven distribution of such fundamental needs as education, employment, and housing, rather than action which deals only with symptoms of social failure.'

These then are the customs and usages of the church in the area with which we are concerned. Plaintiffs have submitted no proof to the contrary. We find no triable issue."

In *Matter of American Press Inc. v. Lewisohn*, 74 Misc. 2d 562, petitioner organized by the Jesuit Order sought exemption from New York real estate taxes. One of petitioner's main activities was the publication of magazines which consisted primarily of non-religious matter. In sustaining the exemption, the court stated (p. 569):

"Many organizations in addition to the church, temple and synagogue act as vehicles for the expression of religion. Moreover, an organization devoted to the mental or moral improvement of men and women is not necessarily a nonreligious function nor automatically to be excised from the concept of religious activity."

CONCLUSION

It is respectfully submitted that the order and judgment dismissing the complaint against UWP should be affirmed; that the appeal from the order denying class action should be either dismissed or affirmed; and that this entire action be dismissed and the litigation terminated.

August 7, 1974.

Respectfully submitted,

HENRY L. BAYLES
Attorney for Appellee,
Up With People, Inc.

APPENDIX

Exhibit "A"

THE OXFORD GROUP—MORAL RE-ARMAMENT, MRA, INC.

LIFE INCOME AGREEMENT

THIS AGREEMENT, entered into this 21st day of June, 1965, between ANNIE LOUISE TEIXEIRA DE MATTOS, care of Messrs. Schill & Capadose, Korte Vijverberg 2, The Hague, Holland, hereinafter called the Donor, and THE OXFORD GROUP—MORAL RE-ARMAMENT, MRA, INC., 112 East 40th Street, New York, New York, hereinafter called MRA,

Witnesseth that the Donor has irrevocably given, transferred and paid over to MRA \$49,395.25, to have and to hold the same unto MRA, its successors and assigns forever, under the following conditions:

FIRST: Said property shall be added to or invested in the Moral Re-Armament Investment Fund, consisting of MRA property in the custody of Kidder, Peabody and Company, New York, New York, and during the period of income payments hereunder shall be invested and reinvested as part of such Fund. Such investments are not subject to statutory or other restrictions which would apply to a fiduciary.

SECOND: MRA shall pay to ANNIE LOUISE TEIXEIRA DE MATTOS, during her life, income as determined under paragraph three of this Agreement.

THIRD: The income payment shall be the proportionate share of the total income earned by the Moral Re-Armament Investment Fund, applicable to the Donor's original gift, adjusted in accordance with subsequent fluctuations in the value of the Fund. In any question with regard to the income payment the decision of MRA shall be final.

Exhibit "A"

FOURTH: Such income determination shall be made quarterly on March 31, June 30, September 30 and December 31 in each year, and payments made to the Donor within fifteen days thereafter. The first payment of income will be made on July 15, 1965.

FIFTH: The obligation of MRA to make any payment to the Donor shall end with the payment next preceding the death of the Donor, it being the intention of the Donor to make a gift to MRA of said property, subject only to the contractual obligation of MRA to make the payments hereinabove provided.

IN WITNESS WHEREOF, the Donor has hereto set her hand and seal, and MRA has hereunto caused its name to be written and its corporate seal affixed by its duly authorized officer, on the day first above written.

Witness:

/s/ SCHILL & CAPADOSE

/s/ ANNE HODGES

/s/ ANNIE LOUISE TEIXEIRA DE MATTOS

/s/ DONALD P. BIRDSALL

THE OXFORD GROUP—

MORAL RE-ARMAMENT, MRA, INC.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Ray Sacks, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 2010 Grand Ave
Bronx NY.

That on the 7 day of Aug, 1974,
deponent personally served the within Brief of Appellee
up with 1 Reply in
upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 2 true copies of same with a duly
authorized person at their designated office.

~~By depositing~~ true copies of same enclosed
in a postpaid properly ~~addressed wrapper, in the post office~~
or official depository ~~under the exclusive care and custody~~
of the United States post office department within the State
of New York.

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

Robert J. Tuttle, Esq.
Attorney for Defendants Appellees
Moral Rearmament Inc
36 West 44th St-
New York, N.Y.

Sworn to before me this

7 day of Aug, 1974

Ray Sacks

Michael De Santis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1978 75

Received 2 copies of the within
Brief of Appellee by with People's
this 7 day of Aug, 1974.

Sign Wm L. R. All. J.
Parker Surge Zernino
For: Malone & Carter Esq(s).

Att'ys for Plaintiff Appellant

Received 3 copies of the within
Brief of Appellee by with People's
this 7 day of Aug, 1974.

Sign see Affidavit attached
For: Robert L. Tuttle Esq(s).

Att'ys for Defendant Appellee
Moral Re-Examination Inc.